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SUPREME COURT, U.S.

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No. 8, Original

In the

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Before The Special Master – Frank J. McGarr

REPORT AND RECOMMENDATION

July 28, 1999

15 pp

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I. Introduction

On October 10, 1989, the United States Supreme Court granted the motion of the States of Arizona and California to reopen the decree in *Arizona v. California, No. 8 Original* to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations, 493 US 886 (1989).

I was appointed as Special Master to hear the parties and to make recommendations to the Court. Since that time, the matter has been the subject of a series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues.

Prior to the completion of the case by hearings on the allocation of water rights flowing from the earlier decisions, extensive negotiations on water rights resulted in a Settlement Agreement submitted for review by the Special Master with a motion seeking a recommendation of approval to the Supreme Court.

There are two motions to approve settlement agreements, together with memoranda in support thereof, and the Agreement and proposed decree to effectuate it.

The first is the joint motion relating to the Fort Mojave Reservation. The second is a similar motion, memorandum, agreement and proposed decree which resolves the issues concerning the Colorado River Reservation.

This case arises out of the historic Colorado River decision in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*") and its aftermath, *Arizona v. California*, 460 U. S. 605 (1983) (hereafter "*Arizona II*"). It was initiated in 1989 by the States of California and Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley Water District ("State Parties") to obtain a final determination of two Indian reservation boundary disputes left unresolved in *Arizona I* (Fort Mojave and Colorado River) and one which was presented but not resolved in *Arizona II* (Fort Yuma (Quechan), so that the reservations' water rights could be finally established in order to facilitate critical water planning in the lower Colorado River Basin.

In *Arizona I*, five Indian reservations along the lower Colorado River (Fort Mojave, Colorado River, Chemehuevi, Cocopah and Fort Yuma) were awarded water rights necessary to satisfy "the future as well as the present needs of the Indian Reservations" in accordance with *Winters v. United States*, 207 U.S. 564 (1908). *Arizona I* at 600. The Indians' needs were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Id.* at 600-01.

California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and

Fort Mojave reservations were actually within their boundaries. The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who generally rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes," *Id.* At 601, and its 1964 Decree provided for "appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 344.

In 1969 and 1974, the Secretary of the Interior issued orders determining the boundaries of the Colorado River and Fort Mojave reservations, respectively. In 1978, the Secretary also issued an order determining the Fort Yuma (Quechan) Reservation boundary.

In 1978, the United States filed a petition to reopen *Arizona I* and , *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the disputed boundary areas. The Special Master appointed to hear those claims, Elbert P. Tuttle, declined to consider the merits of the Secretary's orders, concluding that they constituted "final determinations" of the boundaries within the meaning of the 1964 Decree. *Arizona II* at 634-35. He conducted a trial solely on the issue of the practicable irritability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet of diversions annually. Metropolitan and Coachella thereupon sought resolution of the

three boundary disputes in the United States District Court for the Southern District of California.

This Court subsequently rejected Special Master Tuttle's recommendations and directed the State Parties to pursue the district court action, *Arizona II* at 636, 638, which they did. After the district court voided the Secretary's 1974 Fort Mojave boundary determination and held that a *de novo* trial as to the proper boundary was appropriate, *Metropolitan Water District of Southern California v. United States*, 628 F. Supp. 1018 (S.D. Cal 1986), the Ninth Circuit granted the United States and the Fort Mojave Tribe an interlocutory appeal and held that the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a, did not authorize the State Parties' action and ordered the district court to dismiss the case for lack of jurisdiction. *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987). This Court granted *certiorari* and the Ninth Circuit's decision was affirmed by an equally divided Court *sub nom California v. United States*, 490 U. S. 920 (1989).

On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree:

> "[in] order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations."

> "The State Parties also request the Court (1) to determine whether the United States' claim for additional water for the Fort Yuma Indian Reservation resulting from a 1978 redetermination of the boundary of that reservation and asserted in *Arizona v. California*, 460U.S.605(1983) ("*Arizona II*"),is precluded by the doctrine of *res judicata* and (2) if not, to determine the proper boundary of that reservation and the amount and priority of additional water rights, if any, to which the reservation may be entitled.Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims."

The United States and the Tribes did not oppose the State Parties' motion and the Court granted it on October 10, 1989. 493 U.S. 886 (1989).

On November 17, 1989, Robert B . McKay, Professor Emeritus at New York University School of Law, was appointed Special Master to conduct the reopened proceedings. 493 U.S. 970. Following his death in 1990, the undersigned was appointed to succeed him on November 13, 1990. 498 U. S. 964. Since that time, the matter has been the subject of a

series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues. The central issue in the case was decided in Order No. 14 dated September 20, 1993, which held that the western boundary of the Colorado River Indian Reservation was a riparian boundary.

The proceedings before the Special Master have resulted in twenty-two substantive memorandum opinions and/or procedural orders, which are summarized in Appendix 1 to this Report. The texts of all of them, as well as the transcript of various meetings and the trial of the Colorado River Indian Reservation boundary dispute, are included in the record of these proceedings which accompany this Report.

At an initial meeting with the parties on February 26, 1991, the Special Master was informed that they had agreed in principle to settlement of the Fort Mojave boundary dispute. It was also agreed that certain preliminary issues should be resolved before addressing the merits of the boundary disputes on the Colorado River and Fort Yuma (Quechan) Indian reservations, including whether the United States and the Quechan Tribe were precluded from asserting their claims.

II. The Fort Yuma (Quechan) Indian Reservation Dispute

This dispute involves approximately 25,000 acres of land in the vicinity of the Fort Yuma (Quechan) Indian Reservation in California and Arizona, and the question of whether these disputed boundary lands are part of that reservation and therefore entitled to a consequent increase in the water rights allocated to the reservation by the 1964 Decree in *Arizona I*. No claim had been made for those lands by the United States in

Arizona I because there was a 1936 Interior Department Solicitor's Opinion (the "Margold Opinion") to the effect that the disputed lands were not part of the reservation. Apparently, the Margold Opinion was considered a controlling determination by the United States that the disputed lands were not part of the reservation. The Margold Opinion was affirmed by subsequent Solicitors in 1968 and 1977. Later in 1977, Secretary of the Interior Andrus directed his Solicitor to review the issue once again. On December 29, 1978, Solicitor Krulitz issued an opinion concluding that an 1893 Agreement between the United States and the Quechan Tribe purporting to cede certain tribal lands to the United States was invalid because the United States had not honored a number of conditions in the Agreement. Secretary Andrus then issued an order approving the Krulitz Opinion and including the disputed boundary lands within the Reservation.

In *Arizona II*, Special Master Tuttle had proposed an additional allocation of 78,519 AF of diversions for the disputed boundary lands, which, as noted above, the Court rejected on the grounds that the boundary had not been "finally determined" within the meaning of the 1964 Decree. The United States and the Quechan Tribe were prepared to make the same claim in these proceedings, but the State Parties objected that they were precluded from doing so by having failed to assert their claim in *Arizona I* and, alternatively, by virtue of a final judgment by the Court of Claims in 1983 approving a settlement awarding the Tribe $15 million in a suit filed against the United States in 1951 for the alleged taking of the disputed boundary lands pursuant to the 1893 Agreement. Following extensive briefing of this issue, I rendered Memorandum Opinion and Order No. 4 on September 6, 1991,

which rejected the State Parties' first argument but accepted their second based on the 1983 Court of claims judgment. This holding precluded the Quechan Tribe from asserting their claims in this case. Motions by the United States and the Tribe for reconsideration of that decision were denied by Orders Nos. 5 and 7 of January 20, 1992 and May 15, 1992, respectively. A renewed motion by the Tribe for reconsideration was denied by Order No. 13 of April 13, 1993. Those orders are set forth in Appendices 2 A-D to this Report.

III. The Fort Mojave Indian Reservation Dispute

The Fort Mojave Reservation dispute involved the question of the proper location of the western boundary of a portion of the Reservation in California known as the Hay and Wood Reserve. At issue were some 3350 acres of land with annual water requirements of approximately 12,087 acre feet. After extensive negotiations, the United States, the Fort Mojave Indian Tribe, the States of California and Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley District entered into a Stipulation and Agreement and a supporting memorandum which are attached as Appendix 3.

The settlement (1) agrees on the location of the disputed boundary, (2) disclaims any intent to determine title to and jurisdiction over the bed of the last natural course of the Colorado River within the agreed upon boundaries and preserves the claims and arguments of California and Arizona, on the one hand, and the United States and the Fort Mojave Tribe, on the other, and (3) awards the Tribe the lesser of an additional 3,022 acre-feet of water diversions or enough water to supply the requirements of 468 acres, (4)

precludes future claims by the United States or the Tribe for additional Colorado River water for existing trust or allotted lands within the Hay and Wood portion of the Reservation in California and (5) disclaims any intent to affect any claims to or jurisdiction over any lands.

IV. The Colorado River Indian Reservation Dispute

The Colorado River Reservation dispute involved claims for water rights related to certain lands affected by the proper location of a portion of the western boundary of the Reservation in California. Following denial of the California and Arizona motion for summary judgment on the issue and subsequent trial of the dispute as to the boundary, I rendered a series of opinions on the location of the boundary. Those opinions concluded that the disputed boundary was a riparian boundary along the west bank of the Colorado River, not its mid-channel (Orders Nos. 14 and 16), and that it was not affected by California Civil Code 830 (Order No. 18).

The State of California, the United States, the Colorado River Indian Tribes, The Metropolitan Water District of Southern California and the Coachella Valley Water District subsequently entered into extensive negotiations and later executed a Stipulation and Agreement dated February 23, 1999, settling all water rights disputes associated with the disputed boundary, but, unlike the Fort Mojave settlement, did not resolve the boundary dispute itself. That Stipulation and Agreement and a supporting memorandum are attached as Appendix 4.

The settlement (1) awards the Tribe the lesser of an additional 2100 acre-feet of diversions or enough water to irrigate 315

acres of land, (2) precludes future claims by the Tribes and/or the United States on their behalf for any additional reserved water rights from the Colorado River for lands in California, (3) embodies an agreement not to seek adjudication in these proceedings of the correct location of the disputed boundary, (4) preserves the claims and arguments of California, on the one hand, and the United States and the Tribes, on the other, with regard to title to and jurisdiction over the bed of the Colorado River within the Reservation, (4) precludes reliance by any of the settlement parties on the Special Master's several opinions on the boundary issues in any future boundary litigation among the parties, and (5) provides that it shall only become effective upon the Special Master's unqualified recommendation to the Court for its approval, the court's unqualified approval of the Special Master's Report in this regard, and the issuance of an appropriate decree reflecting approval of the Agreement.

The motion addressed herein seeks the Special Master's approval and recommendation to the Court of the settlement agreement regarding the Colorado River Indian Reservation dispute.

The achievement of this proposed settlement is to the credit of the parties and is the result of extensive negotiation. It resolves the water rights allocation issue which was at the heart of the dispute between the parties. It is a salutary result.

I point out, however, for the Court's consideration, that the original reference to me as a Special Master was to consider the State Parties' Motion to Reopen the Decree of October 10, 1989, "... To Determine Disputed Boundary Claims ..." and in my various opinions

in the case, that is what I have done.

It is true that boundaries determine acreage and acreage determines water rights, and it can be cogently argued that a settlement of water rights claims and allocations without reference to boundaries is sufficient to close the case.

My concern that this settlement agreement leaves unresolved the boundary dispute specifically referred to the Special Master has been addressed by the parties at my request, in a joint response of the settlement parties in a letter dated April 22, 1999 which is appended hereto as Appendix 4. In that response the point is made that the instant boundary dispute, originally a vehicle for water rights determinations, cannot resurface in the future in the context of a tribal water rights claim, thus achieving the finality which the Supreme Court reference was intended to achieve.

It seems apparent that the inclusion of California in this settlement could not have been achieved without that states' reservation of the right to challenge the boundary location for other reasons, but the state holds no water rights which would thereby be adversely affected. The resolution of the water rights issue without determination of the Colorado River Indian Reservation boundary achieves a final result as to water rights, allowing California to continue to litigate the boundary issue only if it arises in some context other than water rights. This conclusion allays but does not totally satisfy the concerns of the special Master that the settlement does not fully address the issue referred to him.

This conclusion does not address that aspect of the Court's reference to a Special

master intended to remove the clouds on the titles of non-Indian users, and that fact is the basis for anticipated objections to this settlement by West Bank Home Owners Association. But the Association is not a party to this litigation, its leave to intervene having been denied, and its objection therefore, is not within the purview of the settlement approval deliberations.

V. Recommendations

A. The Fort Yuma (Quechan) Dispute

As noted above, the Special Master has ruled that the United States and the Quechan Tribe are precluded from asserting a water rights claim for the disputed Quechan boundary lands, which obviated the need to address the merits of the boundary dispute. I recommend that the Court adopt that disposition of the controversy. Orders Nos. 4, 5, 7 and 13 are relevant to this decision and are fond in Appendix 2.

The United States and the Quechan Tribe have indicated their objections to this decision and their intent to file exceptions to that ruling.

B. The Fort Mojave Dispute

The achievement of these proposed settlements is to the credit of the parties and is the result of extensive negotiation. They resolve the water rights allocation issues which were at the heart of the disputes between the parties. It is a salutary result. The Fort Mojave settlement includes the boundary determination, and no boundary issue remains.

C. The Colorado River Dispute

The Supreme Court reference to me as a Special Master at the outset of this case was the result of the motion of the State Parties to reopen the 1964 Decree in order to finally determine the disputed boundaries of the Fort Mojave and Colorado Indian Reservations, which were left unresolved in *Arizona I* and to finally determine the amount and priority of the water rights for those reservations as a result of such determinations.

The United States and the Tribes did not oppose this motion and it was granted on October 10, 1989. 493 U.S. 886 (1989).

Extensive litigation before me followed and boundary determinations were made. In the Colorado River Indian Reservation settlement those rulings are expressly nullified as among the settling parties and the settlement is effectuated by agreed water rights allocation.

As a result, the instant boundary dispute, originally a vehicle for water rights determinations, cannot resurface in the future in the context of a tribal water rights claim, thus achieving the finality as to water rights which the Court's reference was seemingly intended to achieve.

That result, however, leaves open a long standing boundary dispute which affects rights other than water rights, and sets aside for redetermination at an unknown future date, the boundary determination made by the Special Master in this case.

Nonetheless, this decision finally determines boundary claims as to the Fort Yuma and Fort Mojave reservations. As to the Colorado River dispute, the agreement on water rights allocations is a major achievement as

to the central issue of water rights and should not be abandoned because peripheral issues remain. These considerations weigh heavily in favor of acceptance and approval of the settlement presented here despite its failure to lay to rest the Colorado River Reservation boundary dispute.

The Special Master has reviewed the Fort Mojave and Colorado River settlement agreements and supporting memoranda, has concluded that their approval would equitably resolve the water rights disputes in the matter referred to me, and recommends that they be approved by the Court.

The effectuation of this settlement, both as to the Fort Mojave and Colorado River reservations, can be achieved by a supplemental decree which amends this Court's decree of March 9, 1964, and amends also the Court's supplemental decree of January 9, 1979. A proposed draft of such a supplemental decree is attached hereto as Appendix 6.

The motion to approve the settlements agreed to by the United States, the State of California, the State of Arizona, the Fort Mojave Indian Tribe, the Colorado River Indian Tribes, the Metropolitan Water District of Southern California and the Coachella Valley Water District is granted and approval of the agreement is recommended to the Supreme Court of the United States.

Dated: July 28, 1999

Frank J. McGarr
Special Master